

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BEAR OMNIPEDIA LLC,

Plaintiff,

v.

MANIA MEDIA LLC, et al.

Defendants.

Case No. 2:17-cv-01478-MMD-CWH

ORDER

Presently before the Court is Defendant Mania Media LLC's motion to set aside clerk's entry of default (ECF No. 66), filed on November 20, 2017. Plaintiff filed a response (ECF No. 70) on November 22, 2017 and Defendant filed a reply (ECF No. 73) on November 30, 2017. Also before the Court is Plaintiff's motion to strike (ECF No. 76), filed on December 12, 2017.

I. Plaintiff's motion to strike

Plaintiff's motion to strike relates to Defendant's affidavit (ECF No. 73), submitted in support of its reply in support of its motion to set aside clerk's entry of default judgment. Plaintiff moves to strike the affidavit because it "is not a sworn affidavit," "fails to meet the requirements of declaration under federal law," and is "based on hearsay." Pl's Mot. at p. 1. Defendant's affidavit appears to be signed and dated by Defendant's counsel.

It is unclear to the Court the basis for this motion, as Plaintiff fails to articulate with any specificity how the document is legally flawed, or base his assertions on any authority. Under Local Rule 7-2(d), the failure of a party to file points and authorities in support of a motion constitutes consent to the denial of the motion. The Court will therefore deny the motion without prejudice.

II. Defendant's Motion to Set Aside Clerk's Entry of Default

As a preliminary matter, Defendant's motion is styled as both a motion to set aside clerk's entry of default and a motion to quash. However, Defendant makes only a brief mention of the circumstances of service in this case and cites no points and authorities in support of a motion to

1 quash. As noted above, under Local Rule 7-2(d), the failure of a party to file points and authorities
2 in support of a motion constitutes consent to the denial of the motion. Further, Defendant's motion
3 seeks relief under multiple grounds. Under Local Rule IC 2-2(b), when filing a motion or other
4 document with the Court, "[f]or each type of relief requested or purpose of the document, a separate
5 document must be filed and a separate event must be selected for that document." Therefore, the
6 Court will deny Defendant's motion to the extent that it is a motion to quash and consider it only as a
7 motion to set aside clerk's default judgment.

8 Defendant seeks to set aside the Clerk's entry of default (ECF No. 65), entered on November
9 16, 2017. Defendant filed this motion four days after the default was entered, on November 20,
10 2017, arguing that it had not engaged in any culpable conduct leading to the default, that it has
11 meritorious defenses to Plaintiff's claims, and that setting aside the default would not prejudice
12 Plaintiff. Plaintiff disagrees with each of Defendant's arguments.

13 The court may set aside the entry of default for "good cause." Fed. R. Civ. P. 55(c); *United*
14 *States v. Signed Pers. Check No. 730 of Yubran S. Mesle ("Mesle")*, 615 F.3d 1085, 1091 (9th Cir.
15 2010). In ruling on a motion to set aside a default, the court considers whether the plaintiff would be
16 prejudiced if the default is set aside, whether the defendant has a meritorious defense, and whether
17 the defendant engaged in culpable conduct that led to the default. *Id.* The defendant bears the
18 burden of demonstrating that these factors favor setting aside the default. *TCI Grp. Life Ins. Plan v.*
19 *Knoebber ("TCI")*, 244 F.3d 691, 696 (9th Cir. 2001), *overruled on other grounds*, *Egelhoff v.*
20 *Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001). If the defendant fails to meet its burden with respect
21 to any of these factors, the court may deny the motion to set aside the default. *Mesle*, 615 F.3d at
22 1091.

23 To determine whether the plaintiff would be prejudiced if the default judgment is set aside,
24 "[t]he standard is whether his ability to pursue his claim will be hindered." *Falk v. Allen*, 739 F.2d
25 461, 463 (9th Cir. 1984). Setting aside a default must do more than simply delay resolution of the
26 case to be considered prejudicial to the plaintiff. *TCI*, 244 F.3d at 701. Similarly, requiring a
27 plaintiff to adjudicate a claim on the merits does not constitute prejudice. *Id.* Rather, the delay must
28 result in some tangible harm, such as "loss of evidence, increased difficulties of discovery, or greater

1 opportunity for fraud or collusion.” *Id.* (quotation omitted).

2 To satisfy the “not extraordinarily heavy” burden of presenting a meritorious defense, the
3 defendant seeking to vacate a default must present specific facts that would constitute a defense. *Id.*
4 at 700. There must be some possibility that the suit would have a different outcome at trial than the
5 result achieved by default. *Hawaii Carpenters’ Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir.
6 1986).

7 Finally, “a defendant’s conduct is culpable if he has received actual or constructive notice of
8 the filing of the action and intentionally failed to answer.” *TCI*, 244 F.3d at 697 (emphasis and
9 quotation omitted). However, if the defendant offers a good faith explanation for its neglectful
10 failure to answer, and that explanation negates any intent to take advantage of the plaintiff, interfere
11 with judicial decision making, or otherwise manipulate the legal process, such failure is not
12 “intentional.” *Id.* at 697-98. For example, where the defendants received actual notice of the
13 lawsuit, but failed to answer because they did not believe the court had subject matter jurisdiction,
14 the defendants’ failure to answer was not culpable. *Id.* at 698. Instead, a defendant’s conduct is
15 culpable “where there is no explanation of the default inconsistent with a devious, deliberate, willful,
16 or bad faith failure to respond.” *Id.*

17 This test is “at bottom an equitable one, taking account of all relevant circumstances
18 surrounding the party’s omission.” *Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th
19 Cir. 2011) (quotation omitted). The court has discretion to determine whether to set aside a default.
20 *O’Connor v. State of Nev.*, 27 F.3d 357, 364 (9th Cir. 1994). The court’s discretion is especially
21 broad when considering a motion to set aside an entry of default, as opposed to a default judgment.
22 *Id.* Generally, cases should be decided on the merits, rather than by default. *See, e.g., Mesle*, 615
23 F.3d at 1091. The court has the discretion to condition the setting aside of a default under Rule 55(c)
24 on payment of attorney’s fees and costs. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v.*
25 *Louisiana Hydrolec*, 854 F.2d 1538, 1546 (9th Cir. 1988).

26 Here, the Court finds that Defendant has a good faith explanation for the delay in filing a
27 response. Both parties refer to ongoing attempts to settle this case, which appear to have ended only
28 on November 10, 2017 when Plaintiff informed Defendant of its intent to file for a default judgment.

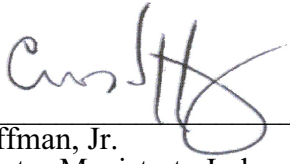
1 Def.'s Reply, Ex. 1 (ECF No. 73-1). Defendant's counsel Chad Anderson filed a notice of
2 appearance just four days later (ECF No. 59), followed by Plaintiff's motion for entry of Clerk's
3 default on November 15, 2017, and Defendant's motion to set aside the Clerk's default on November
4 20, 2017. Given the short time between the breakdown of settlement talks, the notice of Plaintiff's
5 intent to seek default and Defendant's appearance and motion to set aside the default, the Court finds
6 no suggestion that Defendant's failure to answer was an attempt to take undue advantage of the legal
7 process. The Court finds Defendant's neglect in filing a timely answer was not in bad faith.

8 Further, the Court finds that Defendant has alleged facts that, if proven, would constitute a
9 meritorious defense. Namely, Defendant argues that Plaintiff does not own the trademark it claims
10 to own. Finally, given that this litigation is still in its early stages, and that Defendant filed a motion
11 to set aside the Clerk's default less than a week after it was originally sought, and less than two
12 weeks after the parties broke off attempts to settle, the Court finds no suggestion that Plaintiff would
13 be prejudiced by setting aside the default.

14 IT IS THEREFORE ORDERED that Defendant's motion to set aside Clerk's entry of default
15 (ECF No. 66) is GRANTED.

16 IT IS FURTHER ORDERED that Plaintiff's motion to strike (ECF No. 76) is DENIED
17 without prejudice.

18 DATED: December 14, 2017

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21 C.W. Hoffman, Jr.
22 United States Magistrate Judge
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